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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

## No. 73-2017

BROCK & BLEVINS CO., INC., ET AL,
Petitioners,

versus

R. J. BRYAN,
Respondent.

BRIEF OF RESPONDENT
IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

## QUESTIONS PRESENTED

1. Respondent admits that the Petition for Certiorari presents a question respecting pendent jurisdiction of the Fifth Circuit Court of Appeals, but avers that such question is purely academic and not one justifying the grant of the writ, under Rule 19 of this Court (Title 28, U.S.C.A., Supreme Court Rules).

2. Respondent admits that Georgia merger statutes permit a "freeze out" of a minority stockholder by merger, and admits that the sole remedy is appraisal rights, in the absence of fraud.

The second question Petitioner presents is without substantial merit, because here the evidence disclosed and the District Judge found as a fact that Petitioner's Board of Directors concocted, by the use of the Georgia Merger Statute, a deliberate device, scheme and artifice to defraud Respondent, a minority stockholder, out of his stock, and by such fraud attempted to confiscate his stock for the benefit of themselves, in violation of fiduciary responsibilities imposed by law on directors. The second question does not require further discussion.

With respect to the first question presented, original and exclusive jurisdiction was acquired by the United States District Court under Title 15, Section 78aa, U.S.C.A., and the rules and regulations 10-B-5, promulgated pursuant to law.

There, the conclusion was reached that there had been a violation of the Securities Exchange Act, and the rules and regulations promulgated by the Securities and Exchange Commission, as well as a violation of the state law of Georgia. No contention has ever been made that the lower Court's judgment was unsupported by substantial evidence.

On appeal, the Fifth Circuit Court of Appeals ruled:

> "Any equitable cause of action that would lie under the same proof and the same findings of the trial court can properly be adjudicated under the district court's pendent jurisdiction over a state cause of action." (page A-34)

Petitioner for certiorari cites no decision whatever to sustain the claim that reasons exist for granting the writ of certiorari in this case. The law, with respect to pendent jurisdiction, has been many times settled by this Court and other Federal Appellate and District Courts throughout the land, and the decision of the Fifth Circuit Court of Appeals in this case is not in conflict with any cited decision from any other circuit, nor is the decision in conflict with any applicable decision of this Court. Both claims derive from a common nucleus fact.

In numerous cases, questions of pendent jurisdiction have been settled by this and other Courts in the federal system.

> *United Mine Workers of America v. Gibbs* (1966) 383 U.S. 715, 86 S.Ct. 1130, citing with approval *Hurn, et al v. Oursler et al,* 289 U.S. 238, 53 S.Ct. 586, 77 L.Ed. 1148, ruled that: "State law claims are appropriate for federal court determination if they form a separate but parallel ground for relief also sought in a substantial claim based on federal law." (p. 1136, 1137, 86 S.Ct.)

In the case at bar, it was never contended that Respondent's claim, under the Securities Exchange Act, did not have substance sufficient to confer subject matter jurisdiction on the District Court, or sufficient evidence to sustain the judgment with respect to alleged violations, and see in this connection:

> *Levering & Garigues Co. et al v. Morrin et al*, 289 U.S. 103, 53 S.Ct. 549, 77 L.Ed. 1082.

As pointed out in *Gibbs*, supra:

> "The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole." (p. 1138, 86-A S.Ct.), citing cases.

In *Rosado et al v. Wyman etc., et al*, 90 S.Ct. 1207 (1970) 397 U.S. 397, the question presented to the Court, arising under the New York statutes relating to the amounts of payments of aid to families with dependent children, was rendered moot by a three-judge Court, following which the question arose as to whether that substance removed not only the obligation, but destroyed the power of a federal court to adjudicate the pendent claim. This Court held it did not, and that the lower Court, after disposing of the constitutional question could proceed with the grant of injunctive relief.

In the case of:

> *O'Neill Ryan and United States Trust Company of New York, as Trustee of a Trust, dated April 15, 1968, for the benefit of Sara Ryan HILL v. J. Walter Thompson Company,* 453 F.2d 444 (1971) CCA 2nd Circuit,

the action was brought pursuant to the anti-fraud provisions of the Federal Security Laws, as well as a claim under state law. Here, the Court of Appeals said:

> "We agree with the District Court that it properly could exercise jurisdiction over the state law claim under the doctrine of pendent jurisdiction."

(p. 446, 453 F.2d).

In *Leather's Best, Inc. v. S.S. Mormaclynx, et al,* 451 F.2d 800 (1971), it was held that allegations concerning pendent jurisdiction in the complaint are not necessary, that pendent jurisdiction of a Federal Court is not a matter which must be pleaded, since the Court already has jurisdiction over the case, and that the question of pendent jurisdiction involves two discreet inquiries as to whether the Court has power to hear the state claim, and whether, assuming power, the Court should, as a matter of discretion, hear the state claim.

The justification for the exercise of pendent jurisdiction by the Federal Court lies in the considerations

of judicial economy, convenience, and fairness to the litigant.

In *The Greater Iowa Corporation et al v. Frank McLendon, et al* (1967), 378 F.2d 783 (CCA 8th Circuit), an action by stockholders was brought for alleged violations of the securities laws. It was ruled that once Federal jurisdiction attached, as through the use of mails or telephone, full requirements and regulations of pertinent sections of the various securities laws applied.

In *Securities & Exchange Commission v. Manor Nursing Centers, Inc.*, 458 F.2d 1082 (CCA 2nd Circuit) it was ruled that once equity jurisdiction of a District Court has been properly invoked by a showing of a securities law violation, the District Court possesses the necessary power to fashion an appropriate remedy.

In *Herpich et al v. Wallace et al* (1970), 430 F.2d 792, (CCA 5th Circuit) it was ruled that where federal jurisdiction exists under the Securities Exchange Act and rule, the legality of the entire scheme under federal and state law may, in certain circumstances, be determined by a Federal Court in the exercise of pendent jurisdiction.

## CONCLUSION

We respectfully submit that no legal reason exists for the granting of a writ of certiorari, and that the application should be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing Brief of Respondent were on the ____ day of August, 1974, mailed to:

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